

1 **This transcript has been lightly edited for clarity**

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3 PANEL ENTITLED: "KIDS, CALLS AND CIGARETTES: SUCCESSFUL -

4 AND NOT SO SUCCESSFUL - CONSUMER PROTECTION INITIATIVES

5

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11

12 MODERATORS: LYDIA B. PARNES

13 C. LEE PEELER

14

15 MS. PARNES: We would like to start the second
16 panel to keep ourselves on schedule. That was very
17 fast, thank you so much.

18 I'm Lydia Parnes, I'm the Acting Director of the
19 Bureau of Consumer Protection and I would like to
20 welcome you. Oh, no. Oh, no. I am like -- you know,
21 we're the technology bureau. Okay. This is law and
22 order, BCP style. We've got enough of that.

23 But we do have a panel today of forensic legal
24 scholars who've reopened files on three of the FTC's
25 most visible rule-makings: The 1964 Cigarette Rule, the

1 1978 Children's Advertising Rule, and the 2003 Do Not
2 Call Registry. I'm delighted to introduce the stars of
3 our panel.

4 I'll start with our writers. Teresa Moran
5 Schwartz is a leading scholar at George Washington
6 University's Law School. She served the Bureau with
7 distinction as its Deputy Director and also served as an
8 attorney advisor to Commissioner Mary Gardiner Jones.
9 Teresa is currently a member of the Board of Directors
10 of Consumers Union.

11 Bill MacLeod is one of our two former Bureau
12 Directors on our panel today. Bill came to the FTC as
13 an antitrust lawyer. He saw the light and joined a
14 distinguished and growing group of antitrust lawyers who
15 have become skilled consumer protection practitioners.
16 Bill is a partner at Collier Shannon with both consumer
17 protection and antitrust expertise.

18 And Sidney Milkis serves as the White Burkett
19 Professor of Government and Foreign Affairs in the
20 Department of Politics at the University of Virginia.
21 Although Sid never worked at the FTC, he is the
22 co-author of the Politics of Regulatory Change, a very
23 insightful look at the FTC's recent past.

24 Providing what I'm sure will be lively
25 commentary on these papers, Orson Swindle, the FTC's

1 Senior Commissioner. Commissioner Swindle is actually
2 the one person on this panel who actually voted on one
3 of the rules that we're going to discuss, and we look
4 forward to hearing his unique perspective on the Do Not
5 Call Registry and his insights on the other issues
6 raised by these rule-makings.

7 And I guess if I knew baseball better, I would
8 know what hitter it is, the wrap-up hitter or the
9 something like that. Clean-up hitter, thank you. Jodie
10 Bernstein, who served twice as Bureau Director in BCP,
11 and I have to add as a mentor to countless FTC staff
12 members. For her extraordinary contributions to the
13 Agency, she received the Miles Kirkpatrick Award last
14 year and Jodie is currently of counsel at Bryan Cave.

15 And with that, I will turn this over to our
16 first presenter, Teresa.

17 MS. SCHWARTZ: First, I'm going to raise the
18 podium. Jodie got this podium so that it would be
19 lowered, but it also goes up.

20 My role today in ten minutes is to describe
21 these three bold rule-makings and their legal legacies.
22 So, to get started first with the Cigarette Rule. When
23 it came to the Cigarette Rule in 1964, the FTC was not
24 the little old lady on Pennsylvania Avenue described in
25 the Nader Report. Here it took on a powerful industry,

1 it acted with incredible speed, and it used rule-making,
2 which it had never used before under the FTC Act, and
3 which many, including many scholars, thought it didn't
4 have, power it did not have.

5 From Commissioner Phil Elman's oral history, we
6 know it all began on a Saturday in January 1964 when the
7 Surgeon General Committee on Smoking and Health issued
8 its landmark report on the health hazards of cigarette
9 smoking. Three FTC Commissioners were sitting waiting
10 for the report at the Commission and sat together and
11 read it through. When they finished, the Chairman, Paul
12 Rand Dixon, put down his cigarette and said --

13 (Laughter.)

14 MS. PARNES: -- that's my last cigarette. The
15 three Commissioners agreed the FTC should respond by
16 issuing a trade regulation rule requiring that cigarette
17 makers warn of the health hazards of smoking.

18 That day, Commissioner Elman asked his genius
19 assistant, who happened to be Richard Posner, to draft
20 the notice of proposed rule-making, and by the end of
21 that week, it had been approved by the Commission, and
22 announced.

23 Only six months later, after public hearings and
24 following a written comment period, the Commission
25 issued the final rule requiring that all cigarette ads

1 and labels contain a warning that "cigarette smoking is
2 dangerous to health and may cause death from cancer and
3 other diseases."

4 The statement of basis and purpose, also crafted
5 by Richard Posner, was an impressive brief from the
6 rule, crafted to withstand any legal challenge. It
7 argued that massive advertising portraying smoking as
8 pleasurable without warning of its risks was deceptive
9 under the traditional principles, unfair under a new
10 formulation of the unfairness doctrine, and both
11 deceptive and unfair in its exploitation of children,
12 long recognized as deserving special protection under
13 the FTC Act.

14 The cigarette industry appealed the rule, not to
15 the courts, but to Congress, which responded with
16 legislation preempting the rule.

17 A lasting legacy of this rule-making was its
18 framework of three factors to be taken into account in
19 determining whether an act or practice was unfair. They
20 were whether the practice offends public policy
21 established by statutes, the common law or otherwise,
22 whether it is immoral, unethical, oppressive or
23 unscrupulous, whether it causes substantial injury to
24 consumers or competition.

25 Now, the Commission did not actually apply these

1 factors to the rule-making at hand in any systematic
2 way. Its unfairness analysis for the Cigarette Rule
3 focused instead on the tremendous market power that the
4 cigarette industry had achieved over consumers by its
5 decades of massive advertising that camouflage the risks
6 of the cigarette smoking and created barriers to
7 information about those risks.

8 It was this market power, the Commission said,
9 that imposed a special duty of fair dealing on this
10 industry to inform consumers of their product's hazards.

11 The three-factor approach to unfairness was
12 given new life in 1972 when the Supreme Court cited it,
13 approving in the Esperion Hutchinson case. Within a few
14 years, the Commission was using the Cigarette Rule and
15 its unfairness test to support far-reaching
16 rule-makings.

17 Most controversial among them was the
18 Commission's 1978 proposal to regulate television
19 advertising directed to children. The decision to
20 proceed with this rule-making was based on a
21 comprehensive staff report on Children's Advertising
22 that concluded, among other things, that any advertising
23 to children too young to understand its purpose was
24 deceptive and unfair, as was the advertising of sugared
25 products to children incapable of evaluating the health

1 risks of such products.

2 The notice of proposed rule-making invited
3 comment on three remedies, a ban an all TV ads at times
4 when a substantial percentage of the audience would be
5 children too young to understand the purpose of
6 advertising, a ban on TV ads of highly sugared products
7 when a substantial percentage of the audience would be
8 children ages eight to 12, and a requirement that ads
9 for other sugar products be balanced with health and
10 nutrition information.

11 Even for the activist Commission of 1978, the
12 proposal was far-reaching, and, of course, raised
13 serious First Amendment concerns. Interestingly, the
14 Commission in 1964 had cautioned against using the
15 Cigarette Rule as precedent for regulating the
16 advertising of products such as foods and candy.
17 Nevertheless, the staff here relied on the Cigarette
18 Rule for its proposal to regulate children's advertising
19 and used the unfairness test of the Cigarette Rule in a
20 way that revealed just how malleable the test had
21 become.

22 For example, here a substantial injury was to
23 children's dental health, which studies showed parents
24 were ineffective in preventing in the face of powerful
25 television advertising of sugar products. Another

1 injury was to the parent/child relationship. It was
2 unfair, the staff argued, to put parents to a choice
3 between buying products advertised to their children and
4 enduring the conflict that goes with refusing to buy the
5 products. Some of us can relate to this.

6 (Laughter.)

7 MS. MORAN SCHWARTZ: However, with this
8 argument, the staff really rendered almost meaningless
9 the requirement for substantial injury. The other two
10 criteria were similarly easily met. The advertising
11 practices were offensive to the public policies of
12 protecting children, and the practices were oppressive
13 because of the highly disparate power exercised by
14 advertisers over children through their use of the
15 powerful medium of television.

16 The critics, and there were many, focused on the
17 notion that it was government's role to protect parents
18 from having to say no to their nagging children. In a
19 scathing editorial, the Washington Post said it would
20 turn the FTC into a national nanny, a moniker
21 unfortunately which stuck.

22 The Commission terminated the rule-making in
23 1981. After three years, the rule-making record had
24 failed to show that advertising actually affected
25 children's attitudes towards foods and which foods

1 contributed to tooth decay. Further, there were
2 insurmountable difficulties in crafting advertising
3 bans that would not be either under or over-inclusive,
4 since children make up a small percentage of any TV
5 audience. While not framed as a First Amendment analysis,
6 the staff's assessment clearly reflected constitutional
7 concerns.

8 There was no rule, but the rule-making had a
9 legal impact. It spawned a serious Commission effort to
10 reformulate the Unfairness Doctrine. In 1980, the
11 Commission articulated a much more demanding test for
12 unfairness, making consumer injury the primary factor
13 and requiring the injury to be substantial, not
14 outweighed by countervailing benefits to consumers or
15 competition and not reasonably avoidable by consumers
16 themselves. And then in 1994, Congress basically
17 enacted this approach to unfairness.

18 Finally, with minutes to spare, in turning to
19 the rule creating the National Do Not Call Registry, we
20 move forward almost two decades and turn from the FTC
21 Act to the Telemarketing Act that gave the Commission
22 authority to regulate abusive telemarketing practices,
23 including making unsolicited telephone calls that
24 reasonable consumers would consider abusive of their
25 right to privacy.

1 In the original Telemarketing Rule, the
2 Commission had prohibited telemarketers from calling
3 persons who had previously asked them not to call. This
4 was the so-called company-specific approach to Do Not
5 Call. In the 2003 amended Telemarketing Rule, the FTC
6 took Do Not Call to a whole new level. In creating the
7 national registry, it allowed consumers, in one easy
8 step by telephone or email, to register their choice not
9 to receive commercial telemarketing calls. For
10 consumers nationwide who had been experiencing over 16
11 billion telephone calls a year, the registry was wildly
12 popular. In the first 24 hours of operation, 10 million
13 telephone numbers were registered and the number today
14 exceeds 64 million.

15 Congress also liked this rule, and quickly
16 enacted laws to support its implementation and ratify
17 the fact that the Commission had authority to establish
18 it. Not surprisingly, the industry appealed the rule,
19 not to Congress, but to the courts. One of the
20 principal challenges was that the registry unduly
21 restricted protected speech under the First Amendment.
22 The Commission had anticipated the challenge, since the
23 registry does impact nonmisleading commercial speech and
24 therefore must meet the standards of Central Hudson,
25 that it address substantial government interest,

1 directly advance those interests, and be no more
2 expensive than necessary.

3 The Commission had done an excellent job in
4 developing a solid rule-making record and carefully
5 crafting the registry provision to withstand the
6 challenge. It argued convincingly that the privacy
7 interests here involving the privacy of one's home are
8 substantial government interest. It could show on the
9 basis of its solid rule-making record that the registry
10 would significantly reduce unwanted calls and thus,
11 directly advance those privacy interests.

12 Most importantly, the Commission had narrowly
13 tailored the rule so as not to unduly restrict speech.
14 It had exempted charitable solicitations from the
15 registry so that only core commercial speech was
16 affected. The registry also was designed to involve no
17 direct restriction on speech by government, it only gave
18 private individuals a tool to restrict unwelcomed speech
19 directed to them, and then, only if they chose to use
20 it.

21 Finally, the rule-making record clearly
22 demonstrated that the less restrictive company-specific
23 option was not an effective alternative to serve the
24 privacy interest at stake. In *Mainstream Marketing*
25 *Services versus the FTC*, the 10th Circuit Court of

1 Appeals strongly endorsed the Commission's careful
2 approach. In a ruling with significance beyond its
3 immediate impact on the registry, it reaffirmed the
4 importance of protecting privacy rights and gave the
5 Commission helpful First Amendment precedent in this
6 delicate area of law. If the ruling stands, and it
7 should, it could be one of the most important and
8 lasting legacies of the rule.

9 My time is up.

10 (Applause.)

11 MR. PEELER: Thank you very much, Teresa, and
12 our next speaker is Bill MacLeod, and I would note that
13 we've asked our two law professors to condense their
14 graduate seminar course to 10 minutes. So, we
15 appreciate your work.

16 MR. MacLEOD: Thank you, Lee. As Lydia
17 mentioned, I did start out my career as an antitrust
18 lawyer. As a matter of fact, you will be seeing two of
19 my mentors over the course of proceedings over the next
20 couple of days. First was Ken Elzinga at the University
21 of Virginia, with whom I studied economics but
22 especially antitrust economics, and it was partly
23 through Ken that I learned my love of the subject, and
24 then, of course, down at the University of Miami where
25 Tim Muris was my antitrust professor when I took it as a

1 law class. And as you look at them and look at me, I
2 will tell you that even back then they looked younger
3 than I do, so nothing has changed.

4 But let me tell you about my arrival at the FTC
5 back in 1982. It was actually Tim who lured me out of
6 my antitrust practice in Chicago to come to become an
7 attorney advisor for Jim Miller, the Chairman, and I
8 still remember very vividly my first senior staff
9 meeting in the Chairman's Office when I was introduced
10 to Tim and Tom Campbell and Carol Crawford and the rest
11 of Jim's senior staff and they all told me that our job
12 here is to stop the Star Trek law enforcement. We are
13 no longer going to go boldly forth where no man has ever
14 gone before, and I was wondering what are they talking
15 about, because I had been practicing antitrust law and I
16 had found it a pretty good way of making a living.

17 I was defending companies who had to worry about
18 their distributional restraints that were still being
19 governed by a very Draconian rule that had not yet
20 changed from the GTE Sylvania precedent, but consumer
21 protection obviously is where we were heading, and as a
22 matter of fact, I got a first sense of what the senior
23 staff meant when I did my courtesy calls to the
24 Commissioners.

25 I went up to Mike Pertschuk's office, and those

1 of you who will recall, remember that Mike over the door
2 of his inner office had a sign that said, Washington
3 headquarters for jokes, tricks and fireworks. All who
4 enter here, you felt like you were entering a place
5 where we were going to have fun and I began to realize
6 very quickly that what we were going to be facing in the
7 1980s was the battle between the artist and the
8 engineers, the left brain, the right brain, the
9 economists and the activists, and what we had to do in
10 the Miller team was to figure out how to articulate that
11 in an agenda that would hold up in court.

12 Well, let me start with the Cigarette Rule. My
13 assignment today is to talk about the effects of these
14 rules, and Teresa enumerated very well the statement of
15 basis and purpose, the rule's unfairness articulation
16 that we got. One thing that Teresa did not mention was
17 the introduction that the FTC gave to its three elements
18 in the rule as well as the introduction of the Supreme
19 Court cited in the S&H case, and that was no enumeration
20 of examples can define the outer limits of the
21 Commission's authority to prescribe unfair acts and
22 practices. When the Commission said that, I can't
23 imagine they really believed it, but when the Supreme
24 Court repeated that, once again, in a competition case,
25 S&H was not the affirmance of a consumer protection

1 rule, it was a competition case. It was a competition
2 case at the Supreme Court that told the FTC that it did
3 not have to observe the outer limits of its rules.

4 Well, that led to two things. Number one, one
5 of the FTC's most lasting gifts to the Food & Drug
6 Administration, and that was the legislation that
7 followed the Cigarette Rule. I don't know if I would
8 call it preempt as much as I would call it amend. We did
9 get a rule from Congress that was at least a variation
10 of the rule that the FTC was going to impose, but as far
11 as the industry was concerned, far more importantly,
12 what we got from the Cigarette Rule was the law that the
13 Supreme Court held just a few years ago really occupied
14 the field and preempted any FDA role to regulate
15 cigarettes.

16 Interestingly enough -- and another person who
17 will come up again shortly in the Kid-Vid proceeding --
18 the person who really spearheaded the FDA effort, Judy
19 Wilkenfeld, was a major player in our next rule, and
20 that was the Kid-Vid Rule-making.

21 What was it about Kid-Vid that was especially
22 notable in our progression of rules and especially on
23 the evolution of the Agency? I think you can look at
24 the initial staff report recommending the rule and
25 compare that to the final staff report recommending the

1 closing of the rule and see in a very short period of
2 time the maturation of the FTC and the analysis the FTC
3 started to deliver to a number of its rule-making
4 proceedings. Kid-Vid followed what was in both
5 Chairman Pertschuk's description and in Chairman Muris'
6 description a frenzy here at the FTC.

7 After the S&H case, using the unfairness
8 criteria that were not really criteria, the Commission
9 had launched about two dozen rules, most of which were
10 still open and pending during the late 1970s, and it was
11 not really until Kid-Vid came along that the world took
12 notice. The funeral industry took notice, the
13 automobile dealer industry took notice, they were up on
14 the Hill already lobbying to get the FTC constrained,
15 but it was really Kid-Vid, as Teresa mentioned, that
16 got the attention of the country and really galvanized
17 the forces against the Commission.

18 What did the FTC do? They hired this appellate
19 attorney from, I believe the NLRB was her last
20 assignment before the FTC, and Judy actually just told
21 me this morning that her job when she came in to
22 spearhead the staff effort to review the Kid-Vid
23 Rule-making, was to report back to the Commission not
24 how can we kill this Rule, not how can we make this rule
25 that is already obviously politically incorrect

1 something that will go away forever, her job was to
2 determine whether the Rule would survive an appeal,
3 because that was her function at the Commission. And
4 Judy said she went through the record and she came back
5 and she reported, we just don't have the evidence, this
6 is not going to make it.

7 What kind of appeal might it have been? Well,
8 one of the interesting things that I discovered as I was
9 doing this original research, and I was frankly very
10 surprised to find this, is that the economics that was
11 coming out of the competition and antitrust policymakers
12 here at the FTC, but even more importantly out of
13 academia, was gradually taking over the consumer
14 protection policies and they were coming into the
15 Federal Trade Commission, but they were also going
16 somewhere else very importantly and that was the same
17 Supreme Court that gave the FTC the S&H decision.

18 In 1976, we all now well know it was the Supreme
19 Court deciding to extend the First Amendment protection
20 to commercial speech, which up until that time had been
21 held for a number of decades to be without First
22 Amendment protection.

23 Why did the court do this? Well, if you look at
24 the court's famous quote, advertising, no matter how
25 tasteless, nonetheless serves an important role in a

1 free enterprise economy, you will see a couple of
2 citations. One is to an FTC antitrust case, FTC versus
3 Procter & Gamble, one of the most criticized and
4 dismissed cases, these days in antitrust law. That was
5 the case where the FTC decided that the Clorox Company
6 could not be acquired by the Procter & Gamble Company,
7 one of the reasons being that there would be
8 efficiencies in advertising that would simply make
9 Procter & Gamble an unfair competitor in the
10 marketplace.

11 Well, it was not that decision that the Supreme
12 Court cited, it was the concurrence of Justice Harlan,
13 and Justice Harlan said, I frankly don't buy the view
14 that the FTC, and I don't think this court should buy
15 the view, that the FTC propounded in its rationale to
16 block the merger, I think the FTC should not take it
17 upon itself to determine when advertising is part of a
18 social illness, but should recognize advertising as an
19 important measure of the free market economy and how
20 that economy allocates its resources.

21 The second FTC cite was a cite to another FTC
22 rule-making. It was the original FTC Prescription Drug
23 Rule-making, in which the FTC, out of its Bureau of
24 Consumer Protection, was actually practicing competition
25 policy. The FTC in a number of its early rules was

1 promulgating rules not to mandate disclosures or not to
2 reform advertising in some fashion, it was to tell
3 industries that they had to stop restricting advertising
4 amongst themselves, and the Supreme Court cited the
5 FTC's Drug Rule-making for the proposition that it could
6 actually lower drug prices.

7 This blending of economics and law coming from
8 competition policy, you can see in the final report
9 dismissing the Kid-Vid Rule-making and I think you can
10 see throughout the 1980s when we were going through
11 rule-making after rule-making with Ph.D. economists
12 starting with Howard Beales, Fred McChesney in the early
13 '80s, Robert Pitofsky in the late '80s, applying the
14 kind of analysis to rule-making proposal after proposal
15 and saying, this simply does not pass the test of the
16 market analysis that we have to use.

17 One word on Do Not Call. Where does Do Not Call
18 fall in this continuum? I will put to you that there is
19 one feature of Do Not Call that makes it fundamentally
20 different and also fundamentally safer than any rule
21 probably the FTC has ever had to promulgate, and that is
22 the consumer choice that all the rules were analyzed
23 during the '80s and which caused some to rise and some
24 to fall, is the integral part of Do Not Call. It is we
25 consumers who decide whether or not the rule will apply

1 to us and that is going to make it a very hard rule to
2 overcome. I think economics has finally made it an
3 integral part to the FTC rule-makings.

4 With that, I will turn it over to Sid.

5 (Applause.)

6 MR. MILKIS: Good morning, everybody. It's a
7 real honor to be here as an outsider, a political
8 scientist. I feel a little bit like a token, but not
9 too much that way. I guess I should start in the spirit
10 of Judy Bailey's disclaimer this morning and I should
11 say that my views don't necessarily represent those of
12 the University of Virginia.

13 I think the 90th Anniversary celebration of the
14 Federal Trade Commission marks a good time to evaluate
15 the promise and the performance of the Agency, and it
16 also provides an opportunity to examine the critical but
17 uneasy relationship between the bureaucracy and American
18 political culture. As we are heard this morning, the
19 FTC was born of the Progressive Era reform period rather
20 that only began the unending task of reconciling the
21 expansion of national administrative power on the one
22 hand and the anti-bureaucratic tradition of America on
23 the other hand.

24 In one sense, these three initiatives discussed
25 on the panel, the Cigarette Rule, the Children's

1 Advertising Rule, Kid-Vid, and the Telemarketing Sales
2 Rule, indicate that the FTC's efforts as an independent
3 regulatory commission with a sweeping mandate to
4 navigate a non-partisan and professional regulatory path
5 amid an ongoing conflict between consumer activists and
6 champions of free enterprise.

7 At the same time, however, the Commission's
8 consumer protection initiatives reveal the FTC's
9 connection to the political process, and reveal its
10 exposure to sweeping political developments.

11 Now that the FTC can't escape politics large and
12 small doesn't mean it does not exercise independent
13 influence. Indeed, two of the common narratives about
14 the Commission's history that deny this independence
15 can't explain developments at the Agency in consumer
16 protection over the last 35 years.

17 One theory holds that the FTC's dominated by
18 Congress, especially the Oversight Committee. Now,
19 although Congress is surely a substantial influence on
20 the Federal Trade Commission, it doesn't dominate it.
21 Since the development of the Agency into an ambitious
22 professional regulator, during the early 1970s in any
23 case, an ambition that has smitten conservative as well
24 as progressive Commissioners and staff, the FTC has
25 demonstrated considerable independence from Congress in

1 pursuing consumer protection policy.

2 In all three of the policies in question, the
3 Commission played a leading and independent role in
4 advancing consumer protection policy, sometimes, as in
5 the case of the Telemarketing Rule, at Congress' urging.
6 Although remember, Congress authorized the Federal
7 Communications Commission, not the Federal Trade
8 Commission, to explore the possibility of a Do Not Call
9 Registry.

10 Other times, as in the case of the Cigarette
11 Labeling Rule, without consulting legislatures at all,
12 and for that, the FTC was flogged pretty dramatically by
13 the Congress.

14 In the case of Children's Advertising, the FTC
15 was prompted to take some initiative against the
16 marketing of unhealthy foods to young children, but it
17 went much further than key members of Congress wanted.
18 A situation that was made more tense by changes in the
19 members of the Commission's Oversight Committee during
20 the latter part of the 1970s.

21 Now, a common second narrative about the FTC is
22 that it goes through pendulum swings as it comes under
23 the influence of different presidential appointees. The
24 Commission, this narrative presumes, became too
25 aggressive during the 1970s, did far too little during

1 the 1980s, and reached a pragmatic middle path during
2 the 1990s, a path that has continued to travel during
3 the early part of the 21st Century.

4 Now, this story line, I think, also fails to
5 shed adequate light on the three policy initiatives
6 under discussion. Both the Cigarette Rule and the
7 Children's Advertising Rule proceeding depicted the FTC
8 as it became a leading ally of a rising consumer
9 movement. Ed Cox described this very well this morning.
10 A consumer movement that has had considerable bipartisan
11 support as well as an important influence on the
12 nation's regulatory politics for the past three decades.

13 The FTC's intrepid successful opposition to the
14 tobacco industry and cigarette advertising during the
15 late '60s and early '70s, in spite of suffering a strong
16 initial rebuke by the Congress, that signaled the rise
17 of a movement which the FTC was connected to that was
18 dedicated to reforming consumer preferences and
19 restructuring corporate capitalism.

20 The Commission's humiliating failure to complete
21 the Kid-Vid initiative, that testified, as Michael
22 Pertschuk put it, to the pause -- I love that word -- to
23 the pause of the reformist impulse. Similarly, the Do
24 Not Call Registry doesn't represent, I think, a prudent
25 middle course between consumer activism and conservative

1 efforts to roll back social regulation. Rather, the
2 Telemarketing Rule represents the most recent and
3 impressive effort to develop an alternative form of
4 consumer protection that was put in place during the
5 Miller years.

6 Viewing the right to privacy as a conservative
7 principle that complemented, if it didn't conform to his
8 view of the Commission, as an agent of market
9 competition and consumer sovereignty, Tim Muris, a
10 Reagan Republican, showed that conservative activism is
11 not an oxymoron. That conservatism and activism are not
12 competing principles.

13 Now, the two approaches that have shaped
14 consumer protection since the mid-1960s, one dedicated
15 to corporate reform, and this view informed the
16 Cigarette Labeling Rule and Children's Advertising. The
17 other committed to competition and choice, this informed
18 the Do Not Call Registry initiative. They represent the
19 competing frameworks of consumer protection policy that
20 shape and oftentimes polarize contemporary regulatory
21 politics.

22 As the Joe Camel controversy revealed, the FTC
23 is still occasionally buffeted by the conflict by
24 consumer activists and champions of the market. But
25 most recent Commissioners and a substantial part of the

1 professional staff appear to take pride in the FTC's
2 ability to remain free of the raw and disruptive
3 ideological struggles that roil many executive
4 departments and regulatory commissions. They relish
5 working at an island of sanity, as one staffer put it to
6 me, in a sea where many regulators prodded by Congress,
7 the White House, or powerful interest groups have
8 pursued ideological agendas that seek to accomplish,
9 through rule-making and enforcement actions, or
10 inaction, policies that never could have been
11 accomplished through legislation.

12 The FTC's privacy program may be the best
13 example of the bipartisan policy deliberation that has
14 made the Commission a rare, if unique, beacon of
15 regulatory sanity. The Democratically-led Pitofsky
16 Commission put the privacy program on the map, and it
17 matured during the Republican-led Muris Commission. It
18 represents a bold but prudent restriction on business
19 practices, practices like identity theft and irritating
20 telemarketing calls that dog many Americans' days and
21 haunt many Americans' dreams at night.

22 Like the fraud program, which the Miller
23 Commission put on the map and which reached maturity
24 under the Pitofsky Commission, the privacy program
25 reveals how the FTC can be an aggressive servant of the

1 public interest without substituting its will for the
2 public interest.

3 Now, I'm getting a red flag waived at me, so I
4 will finish. Let me just very quickly say something in
5 conclusion. One of the exceptional ingredients of the
6 FTC's recent success is that a Democratic Chairman like
7 Robert Pitofsky and a Republican Chairman like Timothy
8 Muris recognized that government has an important role
9 to play in American society. They both recognize that
10 the emergence of a global economy, for all its
11 blessings, poses fundamental challenges to consumer
12 sovereignty.

13 Consequently, the FTC has avoided the pitfalls
14 of the vitriolic, but I think, often stale debate
15 between champions of big government and celebrants of
16 the invisible hand. This has given FTC Commissioners
17 and staff the luxury -- you are so lucky -- the luxury
18 of participating in a principal debate about what the
19 role of government should play in promoting the welfare
20 of individual consumers at the dawn of the 21st Century.

21 Perhaps this makes the Federal Trade Commission
22 exceptional, but perhaps it establishes the Commission
23 as the edge of a wedge that might provide an opening to
24 a renewed consensus about the role of government in
25 regulating the society and the economy. Thank you.

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1 (Applause.)

2 MR. PEELER: Our next speaker is Commissioner
3 Swindle.

4 COMMISSIONER SWINDLE: Good morning. I don't
5 think I could add to anything that's been said. In
6 fact, if I were to write a paper, it would probably be a
7 combination of all this. But the first thing I want to
8 remark, Lydia, the bumper music that you were using
9 earlier, I first thought it was, I Heard It Through The
10 Grapevine, which I assumed was going to be an
11 introduction of how I got my background in law and
12 antitrust and consumer protection.

13 (Laughter.)

14 COMMISSIONER SWINDLE: But I was pleased to see
15 that it had other meaning. Listening to Teresa talk
16 about some of those descriptive terms of the first
17 unfairness doctrine or policy or explanation or whatever
18 they called it, I think some of the words were
19 unethical, unscrupulous, harmful to consumers. I
20 thought we were able to have a dissertation or
21 discussion of politics today in campaigning, but we'll
22 save that for another day.

23 I feel compelled to perhaps just talk about a
24 novice's impression of all this, and in reading the
25 papers, which they're incredibly entertaining and

1 interesting and informative -- I would hope that they
2 are going to be formalized and made available to the
3 masses -- you cannot help but see in the presentations
4 and the history of the rule-making in the Federal Trade
5 Commission, and particularly these three actions, are
6 almost representative of the evolution of what democracy
7 is all about and what our Constitution is all about and
8 what we as a people are all about.

9 You know, you start off with the Cigarette Rule,
10 a great need suddenly burst on the public, only a few
11 people really get it, but to do something about it,
12 you've got to go against one of the most powerful
13 economic forces in the country, a major economic sector,
14 and if you happen to be from the South, like I am, and
15 you know who the politicians that were going to be
16 involved in this are, or were, you see it's going to be
17 a tremendous obstacle, and to the FTC's credit, it
18 ventured forth, got knocked back a little bit, but it
19 got a foothold on the beach that would lead to later
20 things.

21 Contrary to its promise that they wouldn't use
22 this as a precedent to do things in a different
23 generation, here we go using it as a precedent, we try
24 to move out, Kid-Vid comes along, and here's an example
25 that we see every day in our society in the way we live

1 and work and interact with one another. An absurd idea,
2 the arrogance of it, in my personal opinion, that an
3 organization such as this would think it was in a
4 position to inject itself between a family, or members
5 of a family, namely the parents and the children, is a
6 pretty presumptuous thing. While they might have
7 thought there's a hell of a need here because we've got
8 a problem, and I personally happen to agree, we probably
9 do have a problem, but it gets down to how you do
10 things.

11 And the essence or the best example I've seen of
12 an agency such as this getting involved in something
13 that could be controversial and doing it the right way
14 was the Telemarketing Sales Rule or the Do Not Call
15 Registry. Just an incredible example of doing it the
16 right way, but you know, you learn to do it the right
17 way by experience. You know, you win some, you lose
18 some.

19 I remember reading recently about Michael Jordan
20 making a comment that in his career he had missed over
21 9,000 shots, he had lost over 300 games, and on dozens
22 of occasions he had been given the ball to take the last
23 shot to win and he missed. And he said, through my
24 failure, I succeeded. And in a sense, through the
25 setbacks that we've suffered in doing some of this

1 stuff, we've learned, and we've learned sometimes the
2 hard way, sometimes the easy way, but the point is we
3 learn and we evolve and that's the way we grow.

4 And if you look at the history of our country,
5 you know, how can a country so great on the rights of
6 individuals be responsible for an era and accepting the
7 concept of slavery? We've evolved through all this
8 process, so we keep working at it, we keep making
9 mistakes and we keep making improvements.

10 And again, I think we arrived at the Do Not Call
11 Registry through a process of learning from past
12 mistakes and trying to do something and getting knocked
13 back, and what it boils down to is if you're going to go
14 and fight a war, you gather around you all the possible
15 allies you can gather. And in the case of the Do Not
16 Call Registry, we did a lot of spade work. The
17 precedent had been set through some bumps and knocks and
18 minor successes along the way, but when we got to this
19 one, we did a lot of spade work. And it would be hard
20 for anybody to really argue against the overwhelming
21 success of that, if you're trying to turn it around and
22 go the other direction, which a couple of people in the
23 advertising industry did try to do that and some of them
24 have retired since then. But nevertheless, that's the
25 way life goes.

1 And, as you all know far better than I, this has
2 all been challenged in the courts, questioning the
3 authority of the FTC to do these things. And, you know,
4 the perception of the authority vary.

5 I remember listening to George Carlin one time,
6 you know, the stand-up comedian. He got up and he was
7 talking about authority and power and he said, you know,
8 I've got about as much power as the Pope, my only
9 problem is I don't have nearly as many people that
10 believe that I have the authority of the Pope. So,
11 you've got to have people who believe you have
12 authority, then you've got to move in with confidence
13 and you've got to do it the right way. You can be right
14 and do it the wrong way and lose.

15 The Muris Commission, my dear friend Tim Muris,
16 with this marvelous success and the praise that's been
17 heaped upon him, he's got cartoons written about him and
18 all these neat things, you know, caricatures and
19 articles and everything and praised him and Tim is a
20 dear friend. But it's the same Tim Muris who we tried
21 to do something with the Department of Justice on the
22 antitrust or the competition allocation of who deals
23 with whose cases, that we didn't do our spade work, and
24 we sort of forgot that there's another party up on the
25 Hill and we didn't tell certain key people and we got

1 our hat handed to us. It's how you do things. And I
2 think that's the essence of what we're trying to do
3 here.

4 You know, today there's an awareness of the
5 increasing importance of the countervailing forces in
6 our society. That's the thing that keeps us in balance
7 and keeps us in the middle where we are the greatest.
8 We're not the greatest over here on the left wing or the
9 right wing, we're great in the middle.

10 We've got a more open process and technology has
11 helped immensely here. We've gone through these years
12 with these rules. We've been able to learn more as
13 people and we've learned how to push information out to
14 people and that's part of the marshalling of your
15 forces. We've come to recognize the ultimate, and of
16 course, the Cigarette Rule was the way I look at it, and
17 of course I don't look at it from a legal standpoint,
18 because I don't have that background, but I see it as
19 knowing who the forces at play are in the game. And
20 there we took on a powerful force. But today, there is
21 another special interest that is recognized as a
22 powerful force more so than it ever has been in our
23 history, and that's the consumer or the citizen, better
24 said. That's the ultimate special interest.

25 We've come up with a realism that governance has

1 to be realistic, it has to be practical, and that we
2 also learned that government does have a role to play in
3 all this. It can't be an excessive role, but sometimes
4 when industry doesn't do what it ought to do, not what
5 it said it was going to do, but what it ought to do, do
6 the right thing, we conservatives worry about too much
7 government, too much regulation, but I have come to the
8 conclusion, maybe it's because I've been working with
9 Jodie Bernstein, but you know, I think the reason
10 industry gets regulated is because of industry and what
11 it does do and perhaps, better said, what it does not
12 do. If it does things responsibly, we don't need
13 regulations.

14 That's why so many of us advocate self-
15 regulation, and the advertising industry which we are
16 talking about is a good example of self-regulation. A
17 lot has been learned by others other than the FTC in
18 this process. The rule-making process has educated all
19 of us.

20 Common sense, middle of the road governance is a
21 key. Congressional influence, you know, it's a given,
22 but Sid made the comment that the FTC has sort of come
23 out of all of this sometimes chaotic conditions and the
24 efforts to influence it, it's come out as being quite
25 autonomous, and reading the history of it, I'm just

1 amazed to see how much Congressional pressure and
2 successful influence was imposed on the Agency. And
3 I've had the pleasure of working in the Department of
4 Commerce, the Department of Agriculture and the Defense
5 Department, and I am just absolutely thrilled first, but
6 amazed at how autonomous we really are.

7 There will be little runs at us from time to
8 time by members of Congress, but, you know, if you do
9 good work and you don't step out of bounds and go too
10 far, you develop a credibility and when you've got
11 credibility, it's awful tough for a person in Congress
12 to come and try to get you to do the wrong thing for
13 what he considers the right reasons.

14 The Agency and the people who have been here
15 through all these years are to be commended for the
16 stellar efforts that they have put forth -- and there's
17 Carol Crawford in the back. Hi, Carol.

18 But, you know, so many people have played a role
19 in this. And Sid was talking about it and there was too
20 much in the '70s and not enough in the '80s, and I'm
21 reminded -- I'll close with this. Of all people to
22 quote, Ho Chi Min, with my background.

23 (Laughter.)

24 COMMISSIONER SWINDLE: Ho Chi Min didn't have
25 anything to do while he was in jail one time and he

1 wrote something, I've forgotten what it was, some garish
2 title to it, but it was a piece of prose that said,
3 without the cold and desolation of winter, there could
4 not be the warmth and splendor of spring. Time has
5 tempered and hardened me and turned my nerves into
6 steel. That made him the great leader that he was.

7 These swings back and forth that Sid referred to
8 help us find the middle, and in the middle, if we do
9 things logically, rationally, we will not be subjected
10 to a lot of criticism, and more importantly, we will be
11 able to do the work we're supposed to do, not that which
12 some politician might want us to do. And I look forward
13 to the questions and answers.

14 (Applause.)

15 MR. PEELER: Thank you, Commissioner Swindle,
16 and last but certainly not least, Jodie Bernstein.

17 MS. BERNSTEIN: Thank you, Mr. Lee, thank you
18 panelists and thank you for all the preparers of the
19 papers, which were just absolutely outstanding. I read
20 every one of them, including yours, professor, and
21 learned a great deal. And, of course, a wonderful
22 occasion of the 90th birthday party of the Federal Trade
23 Commission, and I wanted to say, just by way of
24 disclaimer, that neither Orson nor I, who were selected,
25 interestingly enough, to be the commenters of the 90th

1 birthday, were here 90 years ago.

2 For me it sometimes seems like it, because, of
3 course, my long history, which now goes back almost 35
4 years, back to that period just following the ABA Report
5 and the Nader Report, which were so wonderfully
6 described this morning, that I really thought, as I was
7 reading the papers and thinking about what I wanted to
8 say, both about the rule-making authorities that have
9 been raised here this morning, and what I could
10 contribute really to this very learned discussion.

11 And what I concluded was, going back again to
12 what we came to call, as we were working there together,
13 the Lean, Mean Pitofsky Machine. That's what we were,
14 because we were facing, as lots of you well know --
15 Commissioner Jones was there with us -- we were facing
16 national advertising that was totally unregulated and
17 had many problems connected with it, and importantly
18 fraud. Fraud, fraud, fraud. And how many of us were
19 there? There were like, you know, it was a dollar and a
20 quarter's worth of lawyers that we had, and very, very
21 few resources to address either of these issues.

22 That's what we were trying to deal with back
23 then. So, that's my background in terms of where I came
24 to this discussion. And part of what I learned from
25 Professor Pitofsky, and I learned it again when I was

1 back with him again, was whatever you're going to say,
2 be provocative. And I've done that over the years.

3 (Laughter.)

4 MS. BERNSTEIN: I intend to do it today. So,
5 first, I'm going to address my question about this
6 program, to Professor Lee Peeler. I'm holding him
7 responsible for this, and here's what the question is,
8 Lee: Why these three rules? Why were these three rules
9 selected? Think about it. Cigarette Rule, which Lee
10 Peeler characterizes as a qualified success; the Kid's
11 Rule, that's a failure; the DNC, the Do Not Call Rule,
12 an unqualified success.

13 So, from this, are we supposed to come to the
14 conclusion by this biased -- I would say biased
15 selection -- that my Commission, the Lean, Mean
16 Pitofsky-led Bureau was totally misguided in the '70s,
17 leading up to this debacle with the Kid's Rule, right?
18 And so, we should never again take on serious health
19 issues nor deal with special audiences, namely kids.
20 And I don't have to point out to you that there continue
21 to be problems in both of these areas.

22 So, let me just use one example of why I think
23 your selection of these rules biased this discussion.
24 Go back again to the fraud situation. Commissioner
25 Jones used to say to me every week, Jodie, what are we

1 doing about it? There is fraud in the carpet industry,
2 there is fraud in the used car industry, people are
3 getting lemons, there are no protections. In fact, I'd
4 like to quote, if I may, from actually a recent North
5 Carolina Law Review article. And here's what it says:
6 "Inner city stores were selling shoddy furniture.
7 Fly-by-night contractors were promising to install
8 aluminum siding that never appeared. The proverbial
9 used car dealers were hocking lemons, and countless
10 other shady characters were operating in similar fashion
11 in scores of different fields in each of these cases.
12 The defrauded consumer was saddled with the bill when a
13 holder in due course demanded payment."

14 Now, what could we do about all of these
15 matters? 13B was not yet available to us. And that
16 meant that we could bring administrative cases, one case
17 at a time, against these operators all over the country.
18 It was going to have no effect whatsoever. And dealing
19 with that kind of massive fraud, massive fraud, the
20 Commission -- and it did with the leadership of Bob
21 Pitofsky and the Bureau -- came up with a brilliant
22 solution that cut through the fog of fraud. That's
23 really hard to say, the fog of fraud, but it was such a
24 good phrase, I couldn't pass it up.

25 (Laughter.)

1 MS. BERNSTEIN: So, let me tell you what it was,
2 and I'm not going to talk about it in detail, because
3 many of you will have heard of it, possibly many of you
4 have not heard of it, and that was to abolish the
5 so-called Holder in Due Course Doctrine, which had been
6 in commercial law from -- I guess the British gave it to
7 us and we kept it all those years.

8 But we did not try to abolish Section 3 of the
9 Uniform Commercial Code. We did not even try to attack
10 the doctrine, per se. What we did was to make it
11 illegal for a seller to participate in a typical
12 consumer credit transaction unless the instrument
13 includes a specified notice that any holder is subject
14 to all the claims and defenses the debtor could assert
15 against the seller. Just for consumer transactions, not
16 for commercial paper.

17 Now, I've got to tell you that that was one of
18 the most controversial rules of all time. If you want
19 to talk about opposition. Not only was the credit
20 industry, as it existed at the time, opposing it, but
21 more importantly, and I remember this specifically,
22 because Lou Engman was my then Chairman, the Chairman of
23 the Federal Reserve, the Chairman of the Fed, whose name
24 was Byrnes, his real name was Bernstein, but he
25 regularly denied it --

1 (Laughter.)

2 MS. BERNSTEIN: -- when I reminded him of it
3 occasionally. He came over and said to Lou Engman, you
4 must not promulgate this rule. You must not promulgate
5 it, it will bring down the credit market as we know it.
6 Well, Lou Engman signed it and it went into effect. It
7 had a tremendous effect, a tremendous beneficial effect
8 of cutting through fraud throughout the country.

9 So, why didn't you pick that one? I don't know.

10 (Laughter.)

11 MS. BERNSTEIN: Similarly, I will make one more
12 point, because I know I'm running out of time. Bill
13 MacLeod's excellent and useful chart that he included
14 identified several '70s vintage rules which were adopted
15 and implemented, and also addressed consumer issues very
16 equally effective. I'll only mention two, the Octane
17 Rule, which was a disclosure rule, and my all-time
18 favorite, the Care Labeling Rule, which generations of
19 Americans applaud to this day.

20 So, each one of them achieved very high levels
21 of compliance, saving resources. Now, I ask you, how
22 would you compare that to the problems that the
23 Commission and Americans faced in trying to deal with
24 those one at a time, with the very short resource
25 assessments that we had at the time? What I've tried to

1 do, briefly, is for the benefit of those who were not
2 here in the early '70s, is rebalance, perhaps, the
3 contributions of the Commission during the '70s that
4 were not all focused on Kid-Vid, and were major, I
5 believe, contributions to consumer welfare in the United
6 States. Thank you.

7 (Applause.)

8 MR. PEELER: Thank you for those excellent
9 remarks. We will definitely change the name of the
10 panel to four rules. And I would say that all of these
11 papers have been posted on our website. The people who
12 have read them have all said they are excellent papers.
13 If you're practicing consumer protection law or working
14 in the Bureau of Consumer Protection, you really should
15 read these papers.

16 So, with the time remaining today, I think I
17 would like to ask the panel to comment on sort of the
18 findings of the research that was done. There is a
19 tendency, I think, to look at these three rules or these
20 four rules as separate happenings that represent sort of
21 a discontinuous policy development at the Agency. The
22 research really shows that there is a continuous policy
23 development at the Agency, and probably the best example
24 is at the time the Kid-Vid Rule is finally closed up and
25 the boxes are being packed, the Commission's fraud

1 program, which leads to the development of the TSR,
2 which leads to the development of the Do Not Call Rule,
3 is being launched.

4 So, from what you've learned, what are the one
5 or two things that you would tell a new attorney who is
6 coming to the FTC or a new Commissioner who is at the
7 FTC they should draw from this experience over the last
8 40 years? Teresa, do you want to start?

9 MS. SCHWARTZ: Well, knowing your history and
10 learning the lessons, I suppose, from the past is a good
11 place to start. And many people have told me when they
12 first come to the Commission, what they do hear about,
13 but kind of vaguely, are some of these rules we've been
14 talking about.

15 And I suppose one lesson would be to go back and
16 take a look at those, because I think the Commission has
17 learned from these experiences, sometimes, in fact, in
18 fairly dramatic form, the Cigarette Rule and the
19 Advertising Rule, of course, were rules, and you
20 couldn't enjoy the slow evolution that you might through
21 case law development. They were big and visible, with a
22 very broad impact. So, doctrines were put to the test
23 in a very visible way, but learn your history. That's
24 one lesson.

25 MR. PEELER: Bill?

1 MR. MacLEOD: Well, I think the first lesson is
2 when Lee tells you what he wants done, tell Lee he's
3 right, and the research will confirm that he's right as
4 soon as you come back with it.

5 I think the lesson from these rules, and the
6 lesson for any Federal Trade Commission aspiring
7 employee is that limits what? As I said at the outset,
8 the question facing us in the early 1980s was limits
9 versus no limits. What did these rules give us? If we
10 had not had the Cigarette Rule, would we have had
11 Kid-Vid? If we had not had Kid-Vid, would we have an
12 unfairness policy statement. If we did not have an
13 unfairness policy statement, would we have a deception
14 statement?

15 Remember what Judy Wilkenfeld said was her
16 assignment when she had to analyze the Children's
17 Rule-making record, will it hold up on appeal? That is
18 where the limits will cut at the Federal Trade
19 Commission, and if you are not ready at the beginning of
20 a rule-making or the beginning of an investigation of a
21 case, to confront those limits, then sooner or later,
22 you may have a very unpleasant experience.

23 MR. PEELER: Sid?

24 MR. MILKIS: You want me to give advice to
25 attorneys? That's a delicious opportunity. I decided

1 not to go to law school after my first prelaw meeting.
2 I would echo a bit what Teresa says about history, and
3 I particularly like the primordial history that we heard
4 about this morning. You know, Bill was putting down
5 those statutes, the horseman, you know, the guy holding
6 the horse back. I love those statutes.

7 You know, when you look at them, the imagery is
8 kind of like the Soviet Union. You know, you think
9 of -- it invokes some kind of Soviet control and these
10 pictures you're getting and the red flag of the market.
11 But what's fascinating is the Federal Trade Commission
12 is given this power to regulate the market in the United
13 States and to do so in a way that avoids socialism.
14 That was a big issue during the Progressive Era.
15 Remember, McKinley was shot by an anarchist, and I think
16 you recognize that you are at a Commission that has a
17 sweeping responsibility to protect against unfair and
18 deceptive business practices.

19 But you must do it in such a way that you
20 respect the deep-rooted commitment to privacy and
21 individual responsibility in the United States. That is
22 a hell of a balance to strike, but I think every
23 attorney who walks into this building has to consider
24 that kind of a mandate.

25 MR. PEELER: Jodie?

1 MS. BERNSTEIN: In this instance, I agree with
2 your comments particularly, Sid, and I guess for new
3 attorneys coming to the Commission, certainly all of the
4 past could be highly relevant to what they do. But I
5 would urge them to continue to look to see what are the
6 most serious issues facing American consumers and bring
7 in their own creativity and their own innovation, and
8 making sure that those new thoughts, even though you're
9 a new attorney, are considered and raised, because I
10 think that's been one of the great contributions of the
11 FTC; that is, the innovative approaches depending on
12 what's going on in the economy and what is most
13 troublesome to consumers.

14 MR. PEELER: And Orson?

15 COMMISSIONER SWINDLE: You know, in talking to
16 young people who are getting in this business, one of
17 the first things I would suggest that they understand
18 that wisdom is a combined product of intellect and
19 experience, and experience is a great teacher and
20 without it we continue to make the same mistakes over
21 and over. So, I would say, obviously, the history
22 aspects of this place is something to certainly be aware
23 of.

24 Understand, as Jodie asked the question, yes,
25 you do take on the sacred cows. I've done that all my

1 life and I swear to God it just really has made it
2 interesting, and there's been a couple of setbacks along
3 the way, but taking on sacred cows, that's my forte and
4 I totally believe we should do that. But wisdom tells
5 you to pick and choose carefully, because you've only
6 got so much in the way of resources to do it and you
7 can only survive the bullet a couple of times.

8 Know the legal basis for the actions that you're
9 about to try to take, and then lastly, I think if I had
10 to offer one thought to what this Agency has managed to
11 accomplish with the bumps and obstacles in the road, it
12 would lead us to the day to think in terms of empowering
13 the citizens of this country.

14 The Do Not Call Registry was nothing more than
15 empowering consumers to make a choice. And they loved
16 it. And they made the choice. The consumers will make
17 pretty darn good choices if given adequate information,
18 and this whole process has been to get information out.
19 The harmful things that we can eat, the harmful things
20 we can do, the lousy cars, the lousy furniture, as Jodie
21 mentioned, if consumers know this, they'll make a
22 choice, if they're given an option to make a choice, and
23 I think empowering consumers is all about giving
24 consumers a choice.

25 However, I will say that I want it to be real to

1 get back to what Sid just referred to as the Soviet
2 Union, I'm not all that charmed with the Soviet Union.
3 I've been there, I thought it sucked and it did. So, we
4 want to give power to consumers that's real, not the
5 promises of the Soviet Union to its people to give them
6 people power, because that didn't exist.

7 MR. PEELER: Thank you. And I think we have
8 about five minutes left, so I was going to see if there
9 were any questions from the audience for the panel.
10 Otherwise, I'm going to keep going.

11 (No response.)

12 MR. PEELER: Okay, I'm going to go back for
13 another round. Starting with Jodie and Orson. Jodie,
14 when you were preparing for this, Orson said that when
15 you and he were both here, you were sort of the Annie
16 Oakley and he was sort of the John Wayne --

17 (Laughter.)

18 MR. PEELER: -- of enforcement, and I'm
19 wondering if you would both -- and I think Orson hinted
20 at it in his remarks, but the relationship between the
21 FTC's ongoing day-to-day enforcement program and major
22 initiatives like this that seem to take up a lot of the
23 history books, but the ongoing day-to-day enforcement
24 takes up most of the Bureau of Consumer Protection's
25 time. Your thoughts on the relationship.

1 MS. BERNSTEIN: The relationship between Annie
2 Oakley and John Wayne?

3 COMMISSIONER SWINDLE: I want to hear that one.

4 MS. BERNSTEIN: I think I could shoot you dead,
5 if I had to. If I had to.

6 The relationship between law enforcement and --

7 MR. PEELER: And the rules.

8 MS. BERNSTEIN: Oh, and the rules. And the
9 rules.

10 MR. PEELER: I'm not just trying to get back for
11 the holder.

12 MS. BERNSTEIN: I think you just loaded this
13 question for me.

14 Well, I think my view would be, going back to
15 when I was actually the Bureau Director, was that if
16 there is any sort of sense of being able to use all of
17 the authorities, the rule-making authorities, the law
18 enforcement authorities, and any of the others, such as
19 the consumer education that has been developed as one of
20 the ways in which to inform consumers that it is neither
21 of those two, I think I felt that we were very fortunate
22 to have that number of options available to us, and the
23 Commission still has that and uses it very effectively.
24 So, it's something of a mix, because the Commission
25 never has excessive resources, still doesn't, given this

1 huge broad mandate that it has over the entire economy.

2 So, I think it's kind of a mixture and the use
3 of rule-making at least in those early days, it seemed
4 to me, and it seemed to us then, was one of the most
5 effective ways of dealing with these broad, very broad
6 issues. But that was at a time when other techniques of
7 law enforcement had not yet been developed, not only
8 Section 13B, but joining cases together, the sweeps and
9 so forth.

10 So, that's my view of it. It's still a mixture
11 and I think it depends on what particular issues are
12 being faced at a particular time.

13 MR. PEELER: Commissioner Swindle?

14 COMMISSIONER SWINDLE: Jodie probably used
15 resources as well as anybody I've ever seen, given the
16 task that we've had before us, we still have them. And
17 I thought when you look at all of the things that the
18 FTC could do to all of the people who are doing things
19 they shouldn't do, there's no way. So, you can't pursue
20 each one of them, and you have to really invest in
21 educating people. And I think at least from my
22 experience since I've been here, and not knowing a hell
23 of a lot about the past before, but the consumer
24 education aspect of this may be the most important thing
25 we do.

1 I think we've brought in having workshops and
2 that's a little bit slightly different venue from where
3 Jodie was or where we are today, but we have people who
4 are working on trying to enlighten people, and that goes
5 back to what I said awhile ago. Empowering people helps
6 prevent a lot of things we might be tasked to go after
7 and that gives us a little more time to spend on other
8 things. And as far as the special events, if you will,
9 of the Do Not Call Registry, we invested an awful lot of
10 time on that, but from the standpoint of the paper
11 passing through my office, I didn't know the diminishing
12 of any cases being brought forth.

13 So, I think the Commission under Bob Pitofsky
14 was a remarkable place; I think it was remarkable under
15 Tim Muris. We did a lot of things, and I think my
16 impression is probably totally supported by the fact
17 that this Agency, from my observation, and I hear it
18 from people and friends all over the country that don't
19 know a hell of a lot about the FTC, but they know this
20 is a good Agency that does good things for consumers and
21 they appreciate it, and that was not always the case and
22 I think that's a tribute to those who were there when
23 that wasn't the case, who tried to bring it along and do
24 some daring things. And we saw the mistakes, we learned
25 from them, and look at the Agency today, you all should

1 be commended for what you have done.

2 MS. BERNSTEIN: Lee, could I add one thing?
3 Bill Kovacic mentioned this morning something that I
4 thought was very important, and that was transparency in
5 the Agency. And I think both Chairman Pitofsky and
6 Chairman Muris both focused on that.

7 I can think of very few things that are more
8 important to the credibility of a government agency than
9 its willingness to make its thoughts and decisions and
10 so forth as public as is possible. I know
11 confidentiality, of course, is an important issue, but
12 it really does enhance the credibility of government
13 generally and of this Agency.

14 MR. PEELER: And speaking of Chairman Pitofsky,
15 I know he would be disappointed to know that there are
16 three clocks in this room, and I think they all show
17 different times, but I believe that we have two minutes
18 left, and on the point that Jodie raised on
19 transparency, Teresa Schwartz's paper talks about how
20 the process used in the rule-makings may have affected
21 their outcomes. Teresa, could you comment briefly on
22 that?

23 MS. SCHWARTZ: Well, I speculated on the
24 difference between Kid-Vid and Do Not Call Registry
25 provision in terms of how the Commission laid a

1 foundation for the Rule. And in the current practice,
2 especially under Jodie Bernstein, the use of workshops,
3 public forums, getting the industry in, getting the
4 experts in, and having a roundtable discussion with
5 people who really thrash out the problems, starts you
6 off with a foundation of understanding, I think is very,
7 very helpful then in the crafting of the proposed rule
8 and then the ruling in itself. And that was missing
9 from Kid-Vid. There was study, there was research and
10 so forth, but you never had this kind of a get-together
11 in advance of starting down that path. And I kind of
12 speculated as to whether that would have made a
13 difference in Kid-Vid, who knows, but it might have.

14 MR. PEELER: Bill?

15 MR. MacLEOD: I think that's actually a nice
16 combination of your last two questions, because I think
17 between cases and rules, I think the transparency issue
18 is the most important one. Cal Collier mentioned to me
19 a little bit earlier here today that you can look at
20 another very important Commission doctrine which popped
21 right out of consent agreement, which the world did not
22 know about it until they saw it and that was the
23 Substantiation Doctrine in the Pfizer Agreement.

24 Now, the Substantiation Doctrine has been given
25 plenty of vetting since that time, but when the

1 Commission is articulating and possibly even making new
2 and broad policies, the appropriate forum for that is
3 something like the workshops, if not rule-making, so
4 industry and all affected parties can have a chance to
5 weigh in.

6 When you are enforcing a very clear and very
7 well settled area of the law, then go ahead and sue.

8 MR. PEELER: Last word, Sid?

9 MR. MILKIS: I get the last word?

10 MR. PEELER: Last word.

11 MR. MILKIS: What a responsibility. I love the
12 workshop idea and I enjoyed reading the transcripts and
13 one of the interesting things about it is how
14 telemarketers themselves would disagree with one
15 another, which kind of cracked open the possibility to
16 take on a very powerful industry.

17 In terms of transparency, I just want to say
18 briefly that the politics of the Commission are
19 fascinating, and indeed the policies of the Do Not Call
20 Registry were fascinating. It wasn't automatic that the
21 Congress was going to go for this. It took some very
22 sophisticated statement crafting on the part of Tim
23 Muris to get this report and also the way he cultivated
24 public opinion. It wasn't a given that the public would
25 buy onto this as enthusiastically as he did, and I just

1 love the fact when Tim announced this on the McNeal --
2 it's not McNeal Lehrer anymore -- I'm dating myself --
3 but anyway the Lehrer report, that there was no
4 coincidence that the Do Not Call Registry began at 6:00,
5 6:00 p.m., the dinner hour. That kind of sophisticated
6 politicking is important not just for members of Congress
7 but also members of the Commission who take on the kind
8 of policy issues that the Federal Trade Commission takes
9 on.

10 MR. PEELER: With that, I'm over on all the
11 clocks, Judy. I want to thank the panel for their
12 wonderful work and also offer the three writers the
13 opportunity to add the fourth rule.

14 (Applause.)

15 MS. BAILEY: Just two quick items. Some of you
16 have heard all the mention about papers. Some of them
17 are already up on our website and after further
18 refinement, reflection and a little more amendment, they
19 are all going to be published in a few months in the
20 Antitrust Law Journal. So, you have that to look
21 forward to to get this all collected.

22 The other point is lunch. We have a panel, a
23 lunch presentation starting in 15 minutes with three
24 former Chairmen of the FTC and I think that will be a
25 real stellar event. And there are lunches available for

1 those of you who pre-ordered. The way we were set up,
2 we were only, unfortunately, able to get people to sign
3 up and pay and they're available, they're all
4 identified. I am so sorry that we are unable to provide
5 extra lunches for people who either couldn't get it
6 together or didn't know about it. There is a deli in
7 this building out G Street for those people wanting to
8 grab a quick bite. So, we'll see you all back at 12:45
9 to hear Chairman Muris, Pitofsky and Collier.

10 (Whereupon, at 12:35 p.m., a lunch recess was
11 taken.)

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